

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. B-07/08-297
)
 Appeal of)

INTRODUCTION

The petitioner appeals a decision by the Department for Children and Families, Family Services Division, to substantiate physical harm to a child. The issue is whether the Department has shown by a preponderance of evidence that petitioner physically harmed a child within the meaning of the pertinent statutes.

Procedural History

The petitioner filed a request for fair hearing on July 2, 2008. A telephone status conference was held on August 5, 2008 and the fair hearing was scheduled for September 8, 2008.

On September 8, 2008, the Department produced three adult witnesses who testified based on statements from the child regarding the alleged abuse. The child was not made available at hearing. The petitioner appeared *pro se* and did not raise any objections. The Department relied on the hearsay evidence to prove their case.

Based on past Board rulings, the hearing officer recommended that the Department be reversed for failure to present admissible evidence to support their case.

Hearsay is defined in Vermont Rules of Evidence (V.R.E.) 801(c) as:

a statement, other than one made by the declarant while testifying at the trial or hearing, offered into evidence to prove the truth of the matter asserted.

Hearsay evidence is not admissible except as provided by law or other rules. V.R.E. 802. Hearsay is ordinarily not admissible because it is difficult to judge whether the hearsay statement is reliable. The person who made the statement is not available for cross-examination. The trier of fact does not have a full opportunity to assess the person's credibility.

The Board has addressed the use of relaxed hearsay in child abuse substantiation cases after the Vermont Supreme Court ruling in In Re C.M., 168 Vt. 389 (1998). The Board has consistently concluded that the Department cannot present hearsay evidence without making the child available to testify. Fair Hearing Nos. 16,391; 16,479; 18,092; 19,886; and 20,690.

The Department filed a Motion to Reconsider/Motion to Reopen Evidence on September 25, 2008 and the initial

recommendation was withdrawn for consideration of the Motion. The Department argued that the petitioner waived the hearsay objections by not challenging the statements and by not requesting the attendance of the child.

A telephone status conference was held on October 3, 2008. The petitioner explained that he understood the meaning of hearsay. The Department stated they would make the child available but asked that the child's testimony be taken in his county of residence and taken outside the presence of petitioner. Petitioner explained that he preferred that the child not be called as a witness.

The hearing officer determined that questioning the child was necessary to gauge the testimony of the adult witnesses regarding the child's statements to them. Arrangements were made to allow questioning of the child under oath by the hearing officer on January 12, 2009. Both petitioner and the Department's counsel observed the questioning by using a one-way mirror in an adjacent room.

Subsequent to that testimony, the Department asked for additional time to brief an evidentiary issue. Time was granted to the Department to file their motion within ten days, and a subsequent ten days was granted to petitioner to respond. Petitioner did not respond.

The following decision is based upon the evidence adduced at the hearings.

FINDINGS OF FACT

1. The petitioner was the step-parent of K.H. Petitioner lived with K.H.'s mother from January 2001 to approximately September 2007.

2. The precipitating incident occurred on or about June 12, 2007. At the time of the incident, K.H. was nine years old. The Department substantiated physical abuse by petitioner after investigating a report made on June 12, 2007 by the school nurse at K.H.'s school. The allegation was that petitioner kicked K.H.'s right shin causing a bruise.

3. The petitioner has consistently denied kicking K.H. The petitioner testified that he was emotionally unavailable for K.H. and his sisters during 2007. Petitioner's grandmother died in October 2006. Petitioner testified that he had a nervous breakdown in March 2007 and started counseling thereafter. Petitioner testified that his mental problems may have emotionally harmed the children, but that he never physically harmed K.H.

4. B.B. is an elementary school teacher; she was K.H.'s third grade teacher during the 2006-2007 school year.

On June 12, 2007, B.B. testified that when K.H. entered the classroom, he appeared sullen, not focusing and sad. She took K.H. aside to find out what was bothering him. K.H. told her he was hurt at home. B.B. stated that she asked K.H. to wait until she could get coverage for her classroom. B.B. testified that she took K.H. into a room and was told that the petitioner kicked him. The school principal came in and took K.H. to the school nurse. B.B. did not see the bruise because K.H. was in long pants although he normally wore shorts on hot days.

B.B. testified that she had concerns regarding petitioner; she stated he was aggressive towards her. B.B. testified that she was concerned about petitioner's treatment of K.H. She testified that K.H. said he was hit in the stomach by petitioner. She saw his demeanor change over the school year and become more guarded.

5. L.W. is a school nurse; she made the abuse report to the Department on June 12, 2007. She testified that the principal brought K.H. to see her. K.H. had bruises on both his legs. L.W. testified that K.H. said he did not know where the bruises on his left leg were from but that the bruises on his right leg were from petitioner kicking him. K.H. told her that he had been punched in the stomach. He

also told her that petitioner hit him with a spatula other times.

L.W. described the bruise as large and raised. She testified that the bruise was consistent with what K.H. told her.

6. L.S. works for the Department. She was an investigator and was assigned K.H.'s case. She interviewed K.H., B.B. and L.W. at the school.

L.S. testified that K.H. had bruises on his legs but that K.H. indicated that not all the bruises were caused by petitioner. L.S. testified that she found it significant that K.H. distinguished which bruises were caused by petitioner; she testified that she believed K.H. She testified that K.H. told her that he had been kicked and punched in the stomach.

7. K.H. testified briefly on January 12, 2009. He understood the difference between truth and lying; he was forthcoming and limited his answers to what he remembered. He was briefly questioned about what happened in June 2007. He remembered being punched in the stomach but did not mention being kicked.

ORDER

The Department's decision to substantiate physical harm is affirmed.

REASONS

The Department for Children and Families is required by statute to investigate reports of child abuse and to maintain a registry of all investigations unless the reported facts are unsubstantiated. 33 V.S.A. §§ 4914, 4915, and 4916.

The statute has been amended to provide an administrative review process to individuals challenging their placement in the registry. 33 V.S.A. § 4916a. If the administrative review results in a decision upholding the substantiation, the individual can request a fair hearing pursuant to 3 V.S.A. § 3091. Upon a timely request for fair hearing, the Department will note in the registry that an appeal is pending. 33 V.S.A. § 4916(a).

The pertinent sections of 33 V.S.A. § 4912 define abuse, harm, and physical injury as follows:

(2) An "abused or neglected child" means a child whose physical health, psychological growth and development or welfare is harmed or is at substantial risk of harm by the acts or omissions of his or her parent or other person responsible for the child's welfare...

(3) "Harm" can occur by:

(A) Physical injury or emotional maltreatment;

...

(6) "Physical injury" means death, or permanent or temporary disfigurement or impairment of any bodily organ or function by other than accidental means.

The Department bears the burden of proof by a preponderance of evidence that the petitioner abused K.H. within the meaning of the statute.

The Department primarily relies on the statements K.H. gave his teacher and school nurse on June 12, 2007 as well as the statement given to the Department investigator. The investigation was started by K.H. telling his teacher that he had been hurt at home. He made his statements close in time to the incident and he was consistent.

Twenty months later, K.H. remembers being punched but not being kicked. K.H. understood that he needed to answer the hearing officer's questions based on his memory of the facts, not by guessing. Based on his demeanor, it is evident that he would have answered questions truthfully during June 2007 when he was questioned by school personnel and the Department.

Because K.H. was made available, the statements he made to his teacher, school nurse, and Department investigator are admissible. Further, these statements are reliable and can be used as a basis to find that petitioner kicked K.H. causing a bruise to his right leg. See In Re M.B., 158 Vt.

63, 69 (1992) (The Vermont Supreme Court left in place the trial court's decision to allow testimony from a social worker based on a child's statements since the child was made available at hearing although the child had limited memory of the event. The Court stated: "there were substantial indicia of trustworthiness to the out-of-court statements in that they were made to trusted adults in unpressured settings, were consistent internally and with each other, and were corroborated by medical and other evidence."), State v. Labounty, 168 Vt. 129 (1998).

The Board has determined that bruises are temporary disfigurement and constitute abuse. See Fair Hearing Nos. 10,419 (evidence of bruise with history of excessive spanking); 13,796 (child was bruised by parent during isolated incident during the emotional turmoil of a divorce). In contrast, the Board has reversed the Department in cases where the harm does not rise to the level contemplated in the statute. See Fair Hearing Nos. 10,687 (bruise caused by use of spanking during short period for discipline and child was not believed to be at risk of future harm); 21,194 (child sustained scratches when father was trying to restrain child who was physically acting out).

In this case, there is not only evidence that K.H. was bruised by the petitioner kicking him, there are indications that petitioner used physical force in other situations. Placing the evidence of petitioner bruising K.H. by kicking K.H. in context with evidence of petitioner hitting K.H., the Department has shown by a preponderance of evidence that the substantiation is affirmed. 3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4(D).

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